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OR-OSHA ALERT

OR-OSHA Seeks to Eliminate "Rogue Supervisor" Defense… Again

Issue: *Déjà vu – all over again*. In 2012 OR-OSHA informed the regulated community that it intended to develop an administrative rule to limit the application of the "Rogue Supervisor" defense endorsed by the Court of Appeals in the *CC&L* decision. As a result of a concerted resistance to this action by employers, the plan was not pursued. In April and July 2020, OR-OSHA came back to this concept by proposing new administrative rules which defined "reasonable diligence" and "unpreventable employee misconduct." The proposed definitions are designed to achieve OR-OSHA's long-desired goal of undoing the "Rogue Supervisor" defense. If promulgated, the proposed rules will result in employers being liable for the violative conduct of supervisors and lead workers even when such conduct was unforeseeable. In fact, the proposed definitions also virtually eliminate defenses based on unforeseeable non-supervisory employee misconduct as well. The proposed rules achieve this by defining "reasonable diligence" in a way that makes it unachievable, and "unpreventable employee misconduct" as something that virtually never exists. As a result, "constructive employer knowledge" will be found to be present in all situations where employees acting in a supervisory or lead capacity were engaged in or aware of violative conduct, and in almost all cases involving misconduct of non-supervisory employees. The fact that in some cases it was unforeseeable that a supervisor or lead worker, or even an hourly employee, might intentionally choose to not enforce and/or follow safe work rules will become irrelevant. As discussed below, it can be reasonably inferred that the purpose of promulgating these rules is to hold employers strictly liable for the violative acts of any employee, but especially those employees OR-OSHA deems to be in a supervisory or "lead" role. Once this purpose is achieved, the agency will effectively circumvent the controlling appellate case law which currently protects employers from being held "strictly liable" for the unforeseeable bad acts of supervisory and non-supervisory employees alike.

Existing Law: (1) To sustain a citation, OR-OSHA must prove that the cited employer "knew [had actual knowledge] or with the exercise of reasonable diligence, could have known, [had constructive knowledge] of the violation." The courts have held that the OSEA is a fault-based system based on this element of "employer knowledge."

> (2) In cases involving employee misconduct, constructive knowledge does not exist if the evidence indicates that an employee's violative acts were not reasonably foreseeable in light of the particular circumstances. Such evidence includes—but is not limited to—the reasonableness of the employer's efforts in promoting safety in the workplace, and the involved employee's history of adherence to the safety rules. The Courts have held that such misconduct evidence applies to the "bad acts" of a "rogue supervisor."

OR-OSHA's Need for Proposed Rules: OR-OSHA's stated reason for its decision to issue rules defining "reasonable diligence" and "unpreventable employee misconduct" was that it had been directed to do so by the Supreme Court in its 2014 decision in *OR-OSHA v. CBI Services*. Specifically, the agency stated in the rulemaking notice:

> The Oregon Supreme Court determined that Oregon OSHA needs to more clearly define how "reasonable diligence" and "unpreventable employee misconduct" are interpreted and applied in enforcement activities…

This statement is a mischaracterization of the Supreme Court's holding. All the Supreme Court did in *CBI Services* was indicate that OR-OSHA should provide evidence indicating how the agency interpreted and applied the phrase "reasonable diligence" to the specific facts of each case. The Court did not mention needing a definition of the phrase "reasonable diligence." More importantly in the context of understanding OR-OSHA's behind the scene motivation, nowhere in the decision did the Supreme Court suggest that the agency needed to address "unpreventable employee misconduct" in any way. The Agency's statement to the contrary is simply not accurate.

OR-OSHA's Apparent Agenda: What is known is that OR-OSHA has long taken the position that if a safety or health violation could be found by a Compliance Officer (CO), it will be presumed that the employer could have made that discovery had it exercised reasonable diligence. Therefore, the Agency's practice has been that as soon as a CO finds a violation, constructive employer knowledge is deemed to exist. The appellate courts have entirely rejected this policy. Clearly OR-OSHA is now seeking to use its administrative rules to undo the courts' rejection. In addition, notwithstanding the established controlling case law, the agency has continued to consistently impute a supervisor's knowledge of his/her own violative conduct to the employer, regardless of whether such misconduct was unforeseeable. It is apparent that the Agency is attempting through the proposed rules to define "reasonable diligence" and "unpreventable employee misconduct" in such a way that constructive knowledge will be present in all cases of supervisor misconduct, and most cases of non-supervisor misconduct. Under the new rules, employers would be "strictly liable" for the bad acts of any employee OR-OSHA deems to have been in a supervisory or "lead" role.

Downside for Employers of Such a "New Rule": While there are numerous downsides to an OR-OSHA administrative rule that would make employers strictly liable for the bad acts of employees/agents/supervisors, one in particular stands out. That is the effect of such a rule on third party, or "action over" lawsuits. Such suits often arise out of accidents that happen on

multi-employer worksites. The allegations typically surround an injury/fatality to an employee of one employer on such a worksite. The employee or the employee's estate alleges that the negligence of a different employer contributed to the occurrence of the accident. Such lawsuits often involve alleged damages in the six to seven-figure range. If the targeted employer in such a suit has been cited by OR-OSHA for a violation tied to the cause of the accident, liability can be deemed present as a matter of law. After such *per se* liability is attached, the only remaining issue is damages, meaning how much the employer will pay. No "not guilty" defense is available. It therefore becomes critical for employers to not be wrongly cited by OR-OSHA for violations linked to injuries/fatalities. Yet OR-OSHA's proposed rule would result in just that—employers will be wrongly cited and, to make matters worse, more frequently cited. The new reality will be that employers will be cited for the unforeseeable bad acts of employees/agents/supervisors engaged in misconduct, including the actions of "rogue supervisors," notwithstanding appellate court decisions to the contrary. The result of such strict liability in OSHA enforcement cases will be an increased number of contested citations being affirmed, and significantly more strict liability cases arising in third party lawsuits involving alleged violations of the Oregon Safe Employment Act (OSEA).

SUGGESTED ACTION:

1) Attend one of the public hearings on the proposed rules currently scheduled around the state in September and October 2020 to object to the adoption of the proposed rules.

2) Provide written objections to the proposed rules. OR-OSHA will accept written comments on the proposed rules at least through the end of October. A Sample Letter for employers to use, amend or re-write as they see fit in objecting to the proposed rules is attached to this ALERT email. It will also shortly be available on the Cummins, Goodman website.[1]

3) Encourage your trade associations to also object, and to involve their lobbyists in a concerted effort to resist the promulgation of the proposed rules.

4) Contact the Director of DCBS and/or the Governor regarding your objection to these rules being adopted which are intended to negate the fault-based OSEA system the legislature created, and which the Supreme Court and Court of Appeals have endorsed.

5) Motivate legislators to convene an investigative hearing into whether OR-OSHA's attempt to adopt such rules constitutes an abuse of authority by the agency.

Additional information: *On behalf of several clients this firm is preparing a detailed summary of the history and law pertaining to the legitimacy of the proposed rules. The firm intends to submit this document during or before the public hearings so that it will be part of the record going forward. In addition, this document will be made available to those in the regulated community interested in a more in depth discussion of the background, objections, and options for resistance relative to OR-OSHA's proposed rules. The document will be available on the firm's web site shortly. It can be obtained by interested parties who would like to see it in advance of the public hearings by contacting Corinn Rosenbaum at (503) 476-8200, or at Corinn_R@cumminsgoodman.com. Feel free to contact George Goodman with any additional questions.*

[1] The Sample Comment Letter on Employer Knowledge was drafted and is endorsed by George Goodman AAL of Cummins, Goodman, and Lou Ferreira AAL of Stoel, Rives. NOTE: A sample comment letter on OR-OSHA pending proposed rules which seek to dramatically increase penalty exposure in Oregon which was drafted primarily by Lou Ferreira is also attached to this ALERT email.